

1 HONORABLE JAMES L. ROBART
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9
10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE

13 DIGEO, INC., a Delaware corporation,

14 Plaintiff,

15 v.

16 AUDIBLE, INC., a Delaware corporation,

17 Defendant.

18 Civil Action No. C05-00464JLR

19
20 **DEFENDANT AUDIBLE, INC.'S REPLY
21 IN SUPPORT OF MOTION FOR
22 SUMMARY JUDGMENT AND,
23 ALTERNATIVELY, FOR DISMISSAL
24 UNDER FEDERAL RULES OF CIVIL
25 PROCEDURE 12**

26
27 **NOTE ON MOTION CALENDAR:
28 JULY 7, 2006**

29 **ORAL ARGUMENT REQUESTED**

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31 DEFENDANT AUDIBLE'S REPLY IN SUPPORT
32 OF MOTION FOR SUMMARY JUDGMENT AND
33 DISMISSAL
34 Case No. 05-00464

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DEFENDANT AUDIBLE'S REPLY IN SUPPORT
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I. INTRODUCTION

2 Wishing does not make it so. No matter how many times Digeo writes in its Opposition
3 to Audible’s Motion for Summary Judgment (the “Opposition”), that it owns all the rights in
4 and to U.S. Patent 5,734,823 (the “‘823 Patent”), such assertions simply do not take the place
5 of evidence, of facts. It is Digeo’s burden to prove it has standing in this matter. Digeo cannot
6 support this burden. As discussed below, even if Digeo’s errant theory of the case is accepted –
7 that it somehow is the equitable owner of the rights of two inventors in the ‘823 Patent that
8 Digeo now concedes were never actually assigned – such equitable ownership is insufficient to
9 support Digeo’s Complaint for money damages. The Complaint should be dismissed, with
10 prejudice, even if the Court finds Digeo has made a compelling proof that it is the equitable
11 owner of the rights of Edward Chang and Hsiao-Shih Chang (collectively, the “Changs”) that
12 would otherwise belong to the Changs by reason of their being named inventors of the ‘823
13 Patent. A review of the facts demonstrates, however, that no such showing has been made.

II. ARGUMENT

A. Digeo's Sole Theory Is Equitable Ownership — Ownership That Is Insufficient To Support The Complaint.

17 At the outset, Digeo concedes that the document that purports to be an assignment of
18 the rights of inventors Edward Chang and Hsiao-Shih (“Oliver”) Chang to Microtome, Inc. is a
19 forgery and is not legally sufficient to transfer those rights. Opposition at 1. Digeo insists that
20 Edward Chang and, somehow, Oliver Chang, were both officers of Microtome, Inc. (which is
21 the same company as IPDN, “Microtome, Inc./IPDN”) and owed a fiduciary obligation to
22 assign rights in the ‘823 Patent to Microtome, Inc./IPDN.

What must be recognized is that even if Digeo is correct, Digeo is, at best, only an equitable owner of the ‘823 Patent. In the absence of a valid written assignment from the Changs, Digeo cannot sustain the Complaint for money damages, sought in paragraphs 2 and 3 of its prayer for relief. To sustain a Complaint that seeks money damages, an actual

1 conveyance of the patent, an assignment, is required. In the absence of a written assignment
2 from all the inventors to Microtome, Inc./IPDN, no Complaint seeking money damages for
3 patent infringement, or other relief at law, can be sustained. *Arachnid, Inc. v. Merit Indus.*, 939
4 F.2d 1574, 1580 (Fed. Cir. 1991); *Proctor & Gamble Co., v. Paragon Trade Brands, Inc.*, 917
5 F. Supp. 305, 309 (D. Del. 1995) (equitable ownership does not entitle a party to sue for money
6 damages, a remedy at law, in an action for infringement); *Gaia Tech., Inc. v. Reconversion
7 Tech., Inc.*, 93 F.3d 774, 780, 41 USPQ2d 1134 (Fed. Cir. 1996). Where, as here, claims for
8 both money damages and injunctive relief are sought, “it is proper to treat the action as one at
9 law.” *Proctor & Gamble*, 917 F.Supp. at 309, n.6, citing *Pfizer, Inc. v. Elan Pharm. Research
Corp.*, 812 F. Supp. 1352, 27 USPQ2d 1161 (D. Del. 1993). See also *Dynamic Mfg., Inc. v.
11 Craze*, 46 USPQ2d 1548, 1553, 1998 WL 241201 (E.D. Va. 1998).

12 Thus, while Digeo’s evidence does not support its assertions, even if this Court were to
13 find that Diego has an equitable ownership in the rights of the Chang inventors, this suit would
14 have to be dismissed. Digeo is, however, clearly wrong on the facts – as discussed below.

15 **B. Digeo Is Not The Equitable Owner Of The Changs’ Interest And, Therefore, Lacks
16 Standing.**

17 **1. The Burden Of Proof Rests On Digeo.**

18 Digeo wrongly asserts that the burden of showing no material fact as to the issues raised
19 in the Motion rests on Audible. Opposition at 7. The basis of Audible’s Motion is that Digeo
20 lacks standing – both because of Audible’s ownership of the rights of Edward Chang
21 (Audible’s licensor) and because of Oliver Chang’s ownership rights. Where the standing of a
22 party to bring a Complaint is challenged because it lacks complete ownership of a patent, the
23 burden rests on the plaintiff to *prove* standing, not simply to raise possible issues of fact. *TM
24 Patents, LLP v. Int’l Bus. Mach. Corp.*, 136 F.Supp. 2d 209, 58 USPQ2d 1171, 1189-90
(S.D.N.Y. 2001), citing *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir.
25 1993); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

1 It is well settled that the burden of proof to demonstrate standing, when challenged,
2 remains that of the party asserting the Complaint for relief, even if material beyond the
3 pleadings is considered. Thus, when agreements, testimony, or the like are considered to
4 determine whether or not standing exists, such consideration does not convert a Motion to
5 Dismiss for Lack of Standing to one for Summary Judgment.¹ *Pfizer, Inc.*, 812 F. Supp. at
6 1357-58.

7 **2. Digeo Offers No Evidence Of Microtome/Digeo's Equitable Ownership Of
8 Oliver Chang's Ownership Of The '823 Patent.**

9 As to Oliver Chang, Digeo offers no evidence of an equitable interest, or any other right
10 of ownership, of any kind. The sole document Digeo relies on to establish Oliver as a
11 Microtome, Inc. officer (there is no testimony to this effect) is a fictitious business card
12 reflecting Oliver Chang as Chief Technical Officer of Microtome Consumer Products
13 Corporation, NOT Microtome, Inc. According to Digeo, Microtome CPC was a company
14 separate and distinct from Microtome, Inc. *See* Opposition at 3:3-19; Ex.1 at 38 (Michael
15 Saigh deposition describing that Microtome, Inc. and Microtome CPC "were two different
16 companies"); Opposition Ex. 2 (Microtome CPC Articles and Certificate of Certificate of
17 Incorporation); Opposition Ex. 5 (Microtome CPC Executive Summary). There is no evidence,
18 anywhere, that Oliver Chang was EVER an employee of Microtome Inc./IPDN – the sole entity
19 whose patent rights Digeo purchased. Further, the unauthenticated business card that provides
20 the only evidence on which Digeo relies came not from the Changs, but from the architect of
21 the fraud and deception foisted on this Court and the United States Patent and Trademark

22 ¹ The difference between a motion brought under FRCP 12(h)(3) and a motion brought under 12(b)(1) is simply
23 that a motion under FRCP 12(h)(3) can be brought at any time. *See Berkshire Fashions, Inc. v. M.V. Hakusan II*,
24 954 F.2d 874, 880 n. 3 (3d Cir. 1992) (treating a FRCP 12(b)(1) and FRCP 12(h)(3) motions as identical and
25 stating that the "distinction between a Rule 12(h)(3) motion and a Rule 12(b)(1) motion is simply that the former
expresses, considering matters outside the pleading converts only a FRCP 12(b)(6) motion, but not a FRCP
12(b)(1) motion, into one for summary judgment. *See* FRCP 12(b).

1 Office and Audible – Michael Saigh himself.² Deposition of Michael Saigh (the “Saigh Dep.”)
2 at 52 (attached as Ex. 1 to the Declaration of Steven B. Kelber (the “Kelber Decl.”)). Saigh also
3 testified he had no idea of Oliver Chang’s role in the invention, and in Microtome CPC. In his
4 whole life, Michael Saigh talked with Oliver Chang once. *Id.*

5 There is no mention, anywhere, of Oliver Chang as an officer of Microtome, Inc./IPDN
6 – the only company whose intellectual property was acquired by Digeo. Microtome CPC was
7 dissolved in 1997. Digeo Ex. 2 at 15. There is no evidence anywhere that its assets (if any)
8 were transferred to Microtome, Inc./IPDN, Michael Saigh, or any third party. In the absence of
9 evidence that supports the conclusion that Oliver Chang had an obligation to assign to
10 Microtome, Inc./IPDN, a company with which he had no contact, Digeo cannot proceed with
11 this lawsuit. No such evidence is offered, not even a self-serving business card.

12 Digeo offers only rank speculation that flies in the face of the facts. Saigh, whom
13 Brockhouse testified ran Microtome, Inc./IPDN as its sole authority and with an iron fist, met
14 with Oliver Chang only one time – and has no idea what his role in the invention was. Oliver
15 Chang was never an officer or employee of Microtome, Inc./IPDN. There is absolutely no
16 basis for concluding that Digeo has an equitable claim in Oliver Chang’s interest in the ‘823
17 Patent. Oliver Chang’s ownership right springs from his role as co-inventor. *Teets v.*
18 *Chromalloy Gas Turbine Corp.*, 83 F.3d 403, 38 USPQ2d 1695, 1696 (Fed. Cir. 1996). Digeo
19 offers neither evidence nor logic that would support the conclusion that Oliver Chang was an
20 employee, officer or otherwise owed Microtome, Inc./IPDN a duty of assignment. In failing to
21 advance such evidence, Digeo has failed to sustain its burden. The case should be dismissed.

22

23 ² Even if Oliver Chang was the Chief Technical Officer of Microtome CPC, CTO is not an “Officer” of the
24 company that could act for the company in a fiduciary capacity. Microtome CPC corporate records lodged in State
25 of Missouri (not California, as Mr. Saigh would have us believe) identify as officers Michael Saigh, Debra Saigh,
and, in 1995, an Edward Chang living in St. Louis, Missouri. Opposition, Ex. 2, pp. 12-14. Oliver Chang is not
identified as an officer, and no other evidence of any kind of fiduciary relationship between him and Microtome,
Inc. or Microtome CPC is even hinted at by Digeo.

26

1 **3. Digeo Has No Equitable Rights To Edward Chang's Ownership.**

2 Edward Chang is co-owner of the '823 Patent. His ownership is one that arises because
3 he is a named co-inventor of the '823 Patent *Ethicon Inc. v. United States Surgical Corp.*, 135
4 F.3d 1456, 45 USPQ2d 1545 (Fed. Cir. 1998). Unless Digeo can show ownership of that
5 interest, the Complaint in this case must be dismissed for lack of standing and because Audible
6 enjoys a license under the '823 Patent. The only possible source of an interest in favor of
7 Digeo is its purchase, through bankruptcy, of the Patent estate of Microtome, Inc./IPDN (not
8 Microtome CPC which Digeo did not acquire). Digeo nowhere suggests that, in the absence of
9 complete ownership of the '823 Patent by Microtome, Inc./IPDN and thence Digeo, the license
10 from Edward Chang to Audible is insufficient as a defense to infringement. Digeo cannot
11 make the necessary showing.

12 Edward Chang never received a penny for his work on the invention of the '823 Patent,
13 or for Microtome, Inc./IPDN or Microtome CPC. In fact, Michael Saigh testified that most of
14 Edward's work "was on his own dime." Saigh Dep. at 41. Edward once received
15 compensation for travel expenses, when he went to St. Louis to meet with investors. Saigh
16 Dep. at 41-42. Edward Chang received no salary of any kind from Microtome, Inc./IPDN or
17 Microtome CPC. He owned no stock in Microtome, Inc./IPDN or Microtome CPC and, never
18 received a K-1 or 1099 from Microtome CPC or Microtome, Inc./IPDN or anything else
19 reflecting compensation. This series of questions was so critical to Digeo's fact finding that
20 counsel for Digeo asked it twice. Deposition of Edward Chang (the "Chang Dep."), at 25, 43
21 (attached as Ex. 2 to the Kelber Dec.). Both times, Edward Chang answered no – he never
22 received any such forms, because he was never compensated in any way, other than for the
23 expense of his trip to St. Louis.

24 Edward Chang never conducted himself, or held himself out, as an officer of
25 Microtome, Inc./IPDN or Microtome CPC, Chang Dep. at 24, 34, 43. In fact, Edward Chang
26 never even knew Microtome CPC existed as a company, outside of a logo on some letterhead.

1 Chang Dep. at 50. Once he completed his work on the application for the '823 Patent, Edward
2 Chang had no further involvement with Microtome, Inc./IPDN or Microtome CPC. Chang
3 Dep. at 59.

4 The corporate documents reflect the accuracy of Edward Chang's perception that
5 Microtome CPC was not a real company, just something Michael Saigh made up. Although
6 Michael Saigh testified that Microtome CPC was Edward Chang's in fact, the documents from
7 the State of Missouri that Digeo relies on show that the fictitious corporation was not located in
8 California, as Digeo argues is shown in "Corporate Records" but in Missouri. Opposition Ex.
9 2. It lists as the principal place of business in 1994 an address in St. Louis (that does not appear
10 to exist – 7777 Bonhomme Str. Suite 1004) and in 1995 and 1996, 150 S. Price Rd. in St.
11 Louis, which of course, is the home address of Michael Saigh. It gave Michael Saigh's address
12 for the address of Edward Chang, as well as a fictitious address in California in 1994. A review
13 of these documents reflects the signature, over and over again, of Michael Saigh. *Id.* Michael
14 Saigh was the incorporator, the executing officer, the Chairman of the Board, the President and
15 the alter ego of this Company. Edward Chang had no role in it at all.

16 Digeo incredibly asserts as a background fact that "the inventors also had an agreement
17 to share profits." Opposition at 4. No such agreement ever existed. Edward Chang was never
18 party to such an agreement. Chang Dep. at 47 - 48. Michael Saigh could not even remember
19 what the agreement he perceived existed was. He first testified that Edward would get a share
20 of hardware sales made, while he, Michael, would get a share of content, Saigh Dep. at 85 - 86,
21 then testified they would share in net profits. Saigh Dep. at 87. No document exists today
22 reflecting any such, even half-formed, agreement. It was not in corporate records, and Saigh
23 does not recall any signed document of this type. Saigh Dep. at 88. Bottom line, Mr. Saigh,
24 when pressed on the issue of this "agreement," testified "I don't recall if he had signed. In fact,
25 I really don't – I just know that there was something worked on in some agreement. I'm not
26

1 sure - I know I don't have it . . ." No agreement exists. *Id.* at 88. Ed Chang never saw it,
2 Michael Saigh can't recall it.

3 Digeo then strains credulity to the breaking point, by asserting that the situation
4 considered in *In re Access Cardiosystems, Inc.*, 340 B. R. 127, (Bankr. D. Mass. 2006) "is
5 startlingly similar to the situation here and particularly instructive." Opposition at 9. The
6 inventor in question in *Access Cardiovascular Systems*, 340 B.R. at 135 is one Randall Fincke.
7 The Court, characterized his role in the company this way:

8 [I]t is clear from the record that Fincke generally controlled
9 Access from conception through incorporation and beyond.
Fincke testified at deposition that Balesta did not adequately
10 perform his duties as President, leaving Fincke to control and
direct a majority of the company's administrative activities.
Following Baleta's resignation in January of 2001, Fincke took
11 over the role as President. Fincke remained the majority stock
holder and sole director until April of 2003. Even after he no
longer retained a majority of stock ownership in Access, Fincke
12 continued to function as President and CEO until November of
13 2003.

14 Fincke also loaned the company hundreds of thousands of dollars, and received most of it back.
15 *Id.* At 138. Fincke solicited funds from outside investors. *Id.*

16 Edward Chang neither owned nor controlled any stock. He had never heard of the
17 company, and was never paid by the company. He never took action for the company. He was
18 never even told that this so-called "California Company" had been registered in Missouri!
19 Edward Chang did none of the things necessary to establish a fiduciary obligation, and held
20 none of the positions Mr. Fincke did.

21 The rest of the cases cited by Digeo are to the same effect. For example, *In re*
22 *Stonecraft, LLC*, 2005 Bankr. LEXIS 587 at *12 (Bankr. S.D. Miss. March 7, 2005), is
23 representative and cited by most of the remaining cases advanced. Opposition at 8. In that
24 decision the Court held that the individual at issue "he made practically all of the decisions that
25 affected the company's activities. He hired employees and consultants, as well as, terminated
26 employees without the authority of other members." *In re Stonecraft*, 2005 Bankr. LEXIS 587

1 at *12. This is not Edward Chang, who never held himself out as an officer of any Microtome
2 company, had no employees, was never paid, and made no decisions for the company. He had
3 never even been told the company was formed! A fiduciary duty of assignment in the context
4 of a U.S. patent arises when the evidence demonstrates that the actor (Edward Chang) assumed
5 a duty for another's benefit (Microtome, Inc./IPDN) while subordinating his or her own
6 personal interest to that other person. *Univ. of W. Va., Bd. of Tr. v. VanVoorhies*, 278 F.3d
7 1288, 61 USPQ2d 1449, 1456 (Fed. Cir. 2002). Edward Chang did not, at any time, assume
8 responsibility or a duty for Microtome, Inc./IPDN, Microtome CPC, or any other Michael
9 Saigh Company. The events that are required to establish a fiduciary obligation, or an
10 obligation to assign, are controlled by State law. Digeo's Opposition includes absolutely no
11 discussion of when Missouri law would impose a fiduciary duty.

12 The dismissal should be with prejudice. When a District Court dismisses for lack of
13 standing, it can dismiss with or without prejudice. A case should be dismissed with prejudice
14 where it is apparent that the several owners of the patent cannot be joined by the plaintiff.
15 *Fieldturf, Inc. v. Sw. Residential Indus., Inc.* 357 F.3d 1266, 1268 (Fed. Cir. 2004). Edward
16 Chang, in particular, cannot join suit against Audible, having granted Audible a license under
17 the patent in question. (If Edward Change has an interest that must be joined, Audible has a
18 valid license and therefore perfect defense.)

19 **C. Digeo Did Not Acquire All Rights Under The '823 Patent In Its Bankruptcy**
20 **Purchase.**

21 As a crux of its Opposition, Digeo claims that it "acquired all rights under the ['823
22 Patent] in a purchase in bankruptcy" – including the rights of Edward and Oliver Chang – and
23 that Audible cannot now challenge that sale. Opposition, 11:13-14:23. Based on that claim,
24 Digeo argues both that Audible's license to the '823 Patent is invalid and that Digeo has
25 standing to bring this action. *Id.* But Audible need not challenge Digeo's bankruptcy purchase
26 of Microtome, Inc./IPDN's rights to the '823 Patent, because, under established law, Digeo did

1 not purchase all rights under the ‘823 Patent. Rather, it merely purchased only the rights to the
2 ‘823 Patent that Microtome, Inc./IPDN possessed, namely the ownership interests in the ‘823
3 Patent of inventors Brockhouse and Saigh. Regardless of the “free and clear” language in the
4 Bankruptcy Court’s order approving Digeo’s purchase, Digeo did not purchase the ownership
5 interests in the ‘823 Patent of Edward and Hsiao-Shih Chang because Microtome, Inc./IPDN at
6 no time owned those interests.

7 In approving a patent sale free and clear of all liens, claims, and encumbrances, a
8 bankruptcy court nonetheless can only convey “*whatever interest the Debtor has [in the*
9 *patent], and nothing more.*” *TM Patents*, 58 USPQ2d at 1185. *TM Patents* is directly on point.
10 In that case, TM Patents LLP sued IBM for Patent infringement. TM Patents LLP purchased
11 the Patent in the bankruptcy of Thinking Machines, to which IBM was a party. *Id.* at 1184. As
12 in the IPDN bankruptcy, the Thinking Machines Bankruptcy Court ordered that the patent sale
13 was “free and clear of all liens, charges, claims, encumbrances, Administrative Claims,
14 interests and rights of offset.” *Id.* IBM moved to dismiss the infringement claim for lack of
15 standing on the grounds that TM Patents LLP. did not own the patent. *Id.* at 1182-83. IBM
16 contended that Thinking Machines failed to obtain good title to the patent and, thus, TM
17 Patents LLP likewise did not obtain good title to the patent by way of its purchase in the
18 Thinking Machines bankruptcy. *Id.* at 1181. TM Patents LLP asserted in response that the
19 Bankruptcy Court’s Order that the patent was conveyed “free and clear” operated as a complete
20 bar to IBM’s assertion that TM Patents LLP did not own the patent.

21 Granting IBM’s motion to dismiss, the *TM Patents* Court held:

22 Under the Bankruptcy Code, a debtor’s estate consists of, *inter alia*, “all legal or
23 equitable interests of the debtor in property as of the commencement of the
24 case.” 11 U.S.C. § 545(a)(1). The filing of a bankruptcy case does not, and
25 cannot, give a debtor or its creditors greater rights in property than the debtor
had prior to bankruptcy. *See In re Brown*, 734 F.2d 119, 124 (2d Cir. 1984)
(nonetheless affirming debtor’s entitlement to avoid creditor’s lien and enjoy
exemption under bankruptcy Code); *Old Stone Bank v. Tycon I Bldg. Ltd.*

1 *Partnership*, 946 F.2d 271, 276 (4th Cir. 1991). As a result, the Bankruptcy
2 Court's jurisdiction "does not extend to property that is not part of a debtor's
3 estate," *Rutherford Hosp., Inc. v. RNH P'ship*, 168 F.3d 693, 699 (4th Cir.
4 1999), and even a confirmed bankruptcy plan "cannot furnish anyone rights to
5 what was not property of the debtor's estate." *Terry Oilfield Supply Co. v.*
6 *American Sec. Bank, N.A.*, 195 B.R. 66, 73 (S.D. Tex. 1996). Thus, the
7 Bankruptcy Court could not have passed title to the '773 Patent if Thinking
8 Machines had no title to pass. . . . [N]othing in the "free and clear" language
9 quoted above from the Final Judgment of the Bankruptcy Court is inconsistent
10 with that, or expands on the inherent limitation of the Plan and the Collateral
11 Assignment -- namely, that they convey and/or assign whatever interest the
12 Debtor has, and nothing more.

13 *TM Patents*, 58 USPQ2d at 1184-85. Accordingly, Audible need not challenge Digeo's
14 bankruptcy purchase, for Digeo merely purchased Microtome, Inc./IPDN's rights to the '823
15 Patent, which did not include Edward Chang's and Oliver Chang's rights to the patent. Under
16 *TM Patents*, the "free and clear" language in the Bankruptcy Court's Order does not change
17 this.

18 **D. An Award Of Attorneys Fees Is Supported.**

19 Audible seeks attorneys' fees and costs pursuant to 35 U.S.C. § 285. Where the patent
20 infringement plaintiff must reopen its own bankruptcy proceeding, due to fraud and forgery,
21 and seek its money back, as Digeo has, the case is exceptional. Where even the Court observes
22 that this is its first experience with resurrection, the case is exceptional. Digeo asserted in June
23 of 2005, in its 26(a)(1) disclosure, that Edward Chang is alive and well, and then forgot about
24 that representation a year later; the case is exceptional. Where the only way any party ever
25 perceived value in the ownership of the '823 Patent is by reliance on a forgery and deceit,
26 wrongfully representing Edward Chang to be dead, wrongfully representing Oliver Chang to
have signed an assignment on his behalf and that of Edward Chang, and wrongfully forging the
execution of a notary, the case is exceptional. This case, and the mischief and expense, to
which Audible has been put because of the repeated wrongful events, warrant an imposition of
costs and fees.

1 Digeo's principal response is to say "it didn't know." The response is inadequate on
2 two grounds. First, Digeo DID know. Its counsel represented to this Court and to Audible that
3 Edward Chang was alive and possessed of discoverable information. Now Digeo asserts that it
4 did not know this. In any event, Digeo is bound by the words of its counsel. *Dynamics, supra*,
5 46 USPQ2d at 1554, citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 – 34 (1962). Nor is the
6 exceptional, and exceptionally wrong, behavior confined to prior counsel. Digeo told this
7 Court that, given the opportunity, it would present the testimony of Michael Saigh who "is
8 expected to testify that Mr. Chang assigned his rights to Microtome Inc." Digeo's Motion to
9 Extend the Discovery Deadline at 2. Digeo told this Court that it "understood that Mike Saigh
10 has documents relevant to the question of ownership." Motion at 3. Yet, granted the extension,
11 Digeo never even asked Michael Saigh the question if Edward Chang had assigned his rights,
12 and never asked him if he had the documents in question. When asked if he thought the license
13 from Edward Chang to Audible was proper or not, under his understanding of the relative
14 rights, Mr. Saigh replied "I love the fact that he (Edward Chang) got something out of it
15 frankly, I love it." Saigh Dep. at 61.

16 There is, in any event, only one actor here at the center of things. Michael Saigh.
17 Digeo stands in his shoes as successor-in-interest. Digeo had an obligation to investigate Mr.
18 Saigh's documents and representations before filing suit, as it is those documents, which Digeo
19 filed at the Patent Office, that should support essential elements of Digeo's claim (including
20 standing). *Antonious v. Spalding & Evenflow Cos.*, 275 F.3d 1066, 1074 (Fed. Cir. 2002).
21 *Pellegrini v. Analog Devices, Inc.*, 2006 U.S. Dist. LEXIS 726 (C.D. Mass. Jan. 11, 2006). It
22 was Mr. Saigh who signed all corporate documents, who ran the company with an iron fist, and
23 who signed the papers for Microtome CPC as a St. Louis Company, all the while telling
24 Edward Chang and this Court it was his company out in California.

25 Dismissal with prejudice and an award of attorneys' fees for this truly exceptional case
26 are warranted.

DEFENDANT AUDIBLE'S REPLY IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT AND
DISMISSAL- 11
Case No. 05-00464

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1 DATED this 7th day of July, 2006.

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16
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CERTIFICATE OF SERVICE

I, Kit W. Roth, certify that on this 7th day of July, 2006, I caused to be served copies of the attached:

1. Defendant Audible, Inc.'s Reply to Motion For Summary Judgment And, Alternatively, For Dismissal Under Federal Rules of Civil Procedure;

2. Declaration of Steven B. Kelber;

3. Statement of Non-Published Opinions in Support of Defendant Audible, Inc.'s
Reply to Motion For Summary Judgment And, Alternatively, For Dismissal Under Federal
Rules of Civil Procedure; and

4. this Certificate of Service

to the following parties:

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7 I certify under penalty of perjury under the laws of the State of Washington that the
8 foregoing is true and correct.

9 Executed at Seattle, Washington this 7th day of July, 2006.

10 s/ Kit W. Roth

11 SE\9084619.1

12 DEFENDANT AUDIBLE'S REPLY IN SUPPORT
13 OF MOTION FOR SUMMARY JUDGMENT AND
14 DISMISSAL- 14
15 Case No. 05-00464

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